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Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-723

In The

Supreme Court Of The United States

October Term, 1997

RUSSELL HUNTER,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN C. MARKS*
Supervisory Assistant
State's Attorney

LISA HERSKOWITZ
Assistant State's Attorney
Office of the Chief State's
Attorney
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5807

Attorneys for the Respondent

**Counsel of Record*

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QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly determined that its decision to exclude polygraph evidence from state trials does not violate the federal due process right to present a defense?

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OPINIONS BELOW

The Connecticut Appellate Court affirmed the petitioner's conviction in *State v. Hunter*, 37 Conn. App. 907, 655 A.2d 291 (1995). The Connecticut Supreme Court affirmed the Appellate Court's judgment in *State v. Hunter*, 241 Conn. 165, 694 A.2d 1317 (1997). The Connecticut Supreme Court's analysis of the constitutional question is contained in its opinion in the companion case of *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997).

STATEMENT OF THE CASE

Background

The petitioner was arrested on December 14, 1992, in connection with a robbery at Morcey's Restaurant in Waterbury, Connecticut. The State subsequently charged the petitioner by substitute information with the crime of robbery in the first degree in violation of Connecticut General Statutes § 53a-134(a)(4). The petitioner pleaded not guilty and elected a jury trial.

On October 8, 1993, the petitioner filed a written motion in limine seeking authorization to introduce at trial the results of a polygraph examination he had taken. At that time, Connecticut employed the "general acceptance" standard of *Frye v. United States*, 293 F. 1013 (D.C. App. 1923), in determining the admissibility of novel scientific evidence. The Connecticut courts had held that polygraph evidence is inadmissible at trial because of its lack of general acceptance, unreliability, and potential to mislead jurors. *See, e.g., State v. Miller*, 202 Conn. 463, 484-86, 522 A.2d 249 (1987); *State v. Mitchell*, 169 Conn. 161, 169-70, 362 A.2d 808 (1975); *State v. Barnes*, 27 Conn. App. 713, 716, 610 A.2d 689, *cert. denied*, 223 Conn. 914, 614 A.2d 826 (1992).

The petitioner's motion argued that Connecticut should abandon the *Frye* test in light of this Court's abandonment of that test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). It requested the trial court to conduct an evidentiary hearing

concerning the admissibility of the petitioner's polygraph results utilizing the factors described in *Daubert*.

The trial court held a hearing on the petitioner's motion and noted that in a recent Connecticut Appellate Court opinion, the court had concluded that polygraph evidence was still too unreliable to be admissible. *See State v. Barnes*, 27 Conn. App. at 716. The trial court in the *Barnes* case had held an evidentiary hearing on the defendant's proffer of his polygraph results. The trial court in the instant case asked the petitioner whether there had been any improvements in polygraph reliability since the hearing in the *Barnes* case. Petitioner's counsel said he did not know. The trial court denied the petitioner's motion, holding that the unreliability of polygraph evidence and its potential to mislead jurors would make it inadmissible in Connecticut even if the standards in *Daubert* were adopted.

The petitioner appealed to the Connecticut Appellate Court, claiming that the trial court should have abandoned the *Frye* test in favor of the standards enunciated by this Court in *Daubert* and held an evidentiary hearing on the admissibility of his polygraph results.[1] The Connecticut Appellate Court affirmed the trial court's judgment in a one-sentence opinion. *State v. Hunter*, 37 Conn. App. at 907. The Connecticut Supreme Court granted certification to review the Appellate Court's decision, limited to two issues: "(1) Did the Appellate Court properly conclude that

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[1]In his motion in limine and Appellate Court brief, the petitioner cited the sixth amendment in support of his position but did not present a constitutional analysis of the right to present a defense.

the trial court was correct in denying the defendant's request for an evidentiary hearing regarding the admissibility of the defendant's polygraph evidence?" and "(2) Should this court reconsider the applicability of the test for determining the admissibility of scientific evidence set forth in *Frye* . . . in light of the United States Supreme Court's decision in *Daubert* . . .?" *State v. Hunter*, 236 Conn. 907, 670 A.2d 1307 (1996). The court certified the same two issues in *State v. Porter*, 236 Conn. 908, 670 A.2d 1308 (1996).

In his brief to the Connecticut Supreme Court, the petitioner argued that the trial court's refusal to accord him an evidentiary hearing on the admissibility of his polygraph evidence violated his due process right to present witnesses and evidence on his own behalf. His brief cited this Court's decisions in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) and *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). On September 24, 1996, the Connecticut Supreme Court heard oral argument concerning the instant case and the *Porter* case. On May 20, 1997, the Connecticut Supreme Court released its decisions affirming the judgments in both the *Hunter* and the *Porter* cases.

The Connecticut Supreme Court's Opinion

The Connecticut Supreme Court's decision in the instant case is brief and references the court's lengthy opinion in the *Porter* case. *See State v. Hunter*, 241 Conn. at 167. In the *Porter* opinion, the court decided to abandon the *Frye* standard

in favor of the principles adopted by this Court in *Daubert*. *State v. Porter*, 241 Conn. at 66-92. The Connecticut Supreme Court also concluded that polygraph evidence should remain inadmissible in judicial proceedings subject to the rules of evidence, because the probative value of such evidence is outweighed by its prejudicial impact. *Id.* at 94, 115. The court conducted an extensive review of the scientific literature and the methodology of polygraphy. *Id.* at 94-124. The court noted that there existed wide disagreement in the literature regarding the accuracy of polygraph exams, largely due to disagreement among the experts concerning which methods of measuring accuracy and which studies within each method are methodologically valid. *Id.* at 105-106. The court also noted that without reliable information on the percentage of people who take polygraphs who lie and the percentage who tell the truth, it is impossible to assess the predictive value of a particular polygraph result. *Id.* at 109-113. Finally, deceptive examinees schooled in countermeasures can avoid detection more than fifty percent of the time. *Id.* at 114.

Against the questionable probative value of polygraph evidence, the Connecticut Supreme Court weighed its potential for prejudice. The court noted that jurors are competent to evaluate credibility without expert testimony. *Id.* at 116. It distinguished polygraph evidence from other types of scientific evidence, noting that while jurors cannot themselves determine, for example, whether a bloodstain contains DNA consistent with a particular individual, the jury has always been entrusted with

determining credibility. *Id.* at 116-117. The Court concluded that "polygraph evidence so directly abrogates the jury's function that its admission is offensive to our tradition of trial by jury" and that "it violates the premise of this entire system to allow a single person -- the polygrapher -- to label a witness as honest or dishonest based solely on the same type of indirect evidence that we generally maintain takes an entire jury to evaluate." *Id.* at 118-119. The court also noted that the admission of polygraph test results at trial would likely produce regular and immensely time-consuming battles of the experts. *Id.* at 121. In every case, the trial court would have to consider the training and competence of the examiner, whether the examination questions were appropriate, and whether the test was correctly administered. *Id.* at 121-23. In addition, "[b]ecause many experts doubt the entire physiological and emotional basis of the polygraph test, many courtroom skirmishes will be fought over the scientific validity of the entire polygraph procedure." *Id.* at 122-23.

The Connecticut Supreme Court concluded based on these considerations that the prejudicial impact of polygraph evidence outweighs its probative value. *Id.* at 124. The court noted that its decision was supported by the majority of states that had considered the issue. *Id.* at 124-25. The court also considered the experiences of four states -- Massachusetts, Wisconsin, North Carolina and Oklahoma -- that admitted polygraph evidence for a period of time, then retreated to a per se rule of inadmissibility. *Id.* at 127-29.

Finally, the Connecticut Supreme Court concluded that the trial court's refusal to accord the defendant an evidentiary hearing on the admissibility of his polygraph results did not deprive him of his constitutional right to present a defense. The court noted that the right to present relevant testimony is not without limitation and that evidentiary rules violate the federal constitution only when (1) without a rational basis, they disadvantage the defendant more severely than the prosecution, or (2) they arbitrarily exclude reliable defense evidence without achieving a superior social benefit. *Id.* at 133-34. The court concluded that the exclusion of polygraph evidence does not violate the constitution because "there is a very strong basis for excluding polygraph evidence" and "such exclusion is not arbitrary given the polygraph test's demonstrated lack of probative value." *Id.* at 134. The court stated that:

> If, at some future date, *substantial* evidence indicates that some polygraph or other lie detection technique has reached a sufficiently high level of validity that the probative value of such evidence potentially outweighs its prejudicial impact, we may be forced to revisit this issue.

Id. at 136.

ARGUMENT

State courts must be allowed latitude in fashioning evidentiary rules to govern their own judicial proceedings. Although criminal defendants have a federal constitutional right

to present a defense, this Court has concluded that "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." *Montana v. Egelhoff*, ___ U.S. ___, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996). In light of these principles, it would be inappropriate for this Court to grant certiorari unless the petitioner can establish that the circumstances of his case fall within the ambit of this Court's jurisprudence on the right to present a defense. This he cannot do.

The petitioner relies primarily upon this Court's decisions in *Washington v. Texas*, 388 U.S. at 14; *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); and *Rock v. Arkansas*, 483 U.S. at 44. However, these cases are inapposite. In each case, the defendant was prevented from presenting his or her version of the facts to the jury. In each case, the state evidentiary rule at issue either disadvantaged the defendant more than the prosecution without a rational basis, or arbitrarily excluded evidence that bore strong assurances of reliability. This Court's decisions in all three cases are very fact-bound; in each, the evidentiary rule at issue operated in a manner that, in light of the particular circumstances of the case, deprived the defendant of fundamental fairness.

In contrast, in the present case, the petitioner was allowed to present his version of the facts to the jury. The Connecticut Supreme Court's decision to bar polygraph evidence does not disadvantage defendants more than the prosecution, and does not arbitrarily exclude evidence that bears strong assurances of

reliability. Moreover, there is nothing in the circumstances of the petitioner's case to suggest that the exclusion of his polygraph results deprived him of a fundamentally fair trial. For these reasons, this Court should deny certiorari.[2]

This Court's Jurisprudence On The Right To Present A Defense

In *Washington v. Texas*, 388 U.S. at 16, the defendant was prevented, by a state evidentiary rule barring coparticipants in a crime from testifying for one another, from presenting a witness' testimony that the witness, not the defendant, shot the victim, and that before the shot was fired the defendant tried to persuade the witness to leave. This Court noted that the witness' testimony was "vital to the defense" because the witness "was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting." *Id.* This Court also noted that the evidentiary rule did not prevent a coparticipant in a crime from testifying for the State, or testifying for the defense after the coparticipant was acquitted at his own trial. *Id.* at 16-17, 22-23. This Court held that the rule was arbitrary and irrational because a coparticipant would have a greater incentive

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[2] This Court currently has pending before it the case of *United States of America v. Airman Edward G. Scheffer*, No. 96-1133. The *Scheffer* case raises the issue of whether Military Rule of Evidence 707, which proscribes the admission of polygraph evidence in court-martial proceedings, is violative of the constitutional right to present a defense. The State of Connecticut and twenty-eight states have filed a brief as amici curiae in support of the petitioner in the *Scheffer* case.

to lie for the prosecution in order to obtain favorable treatment, or to lie after an acquittal when he could not again be prosecuted for the same offense, than to lie for the defendant. *Id.* at 22-23. This Court held that the right to present a defense is "the right to present the defendant's version of the facts . . . to the jury," and that the exclusion of the testimony had deprived the defendant of his constitutional rights. *Id.* at 19, 23.

In *Chambers v. Mississippi*, 410 U.S. at 284, the defendant was prevented, by state evidentiary rules barring a party from impeaching his own witness or from introducing hearsay declarations against penal interest, from effectively confronting a witness, McDonald, who had given his attorney a sworn confession to the crime. At trial, the defendant presented eyewitness testimony that McDonald committed the murder. *Id.* at 289. The defendant called McDonald and introduced his confession into evidence, but during cross-examination by the State McDonald repudiated the confession. *Id.* at 291. The defendant moved to examine McDonald as an adverse witness and to introduce the testimony of three other witnesses to whom McDonald had admitted committing the crime. *Id.* at 291-92. The trial court denied both motions. *Id.* at 291-93.

This Court noted that "[a]s a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, [the defendant] was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Id.* at 294. This Court held that

the voucher rule, which prevented the defendant from impeaching McDonald after calling him as a witness, was antiquated and had impermissibly interfered with the defendant's right to confront and cross-examine witnesses. *Id.* at 295-98. This Court also noted that Mississippi limited its exception to the hearsay rule for declarations against interest to declarations against pecuniary interest, and that a number of states and the proposed federal rules of evidence had discarded such a limitation. *Id.* at 299. While the limitation was "usually premised on the view that admission [of declarations against penal interest] would lead to the frequent presentation of perjured testimony," McDonald's hearsay admissions "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.* at 299-300.[3]

Because the proffered testimony "bore persuasive assurances of trustworthiness" and was "critical" to the defense, the hearsay rule could not be applied mechanistically to defeat the ends of justice. *Id.* at 302. This Court concluded that the combination of the two rules had deprived the defendant of a fair trial, but limited its holding to the particular facts and circumstances of the case, stating, "we establish no new principles of

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[3] Each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder, each was corroborated by some other evidence in the case, and McDonald did not stand to benefit by disclosing his culpability to any of the friends to whom he had confessed. *Chambers v. Mississippi*, 410 U.S. at 300-301. Moreover, McDonald was available for cross-examination by the State, so the jury could weigh his demeanor and responses. *Id.* at 301.

constitutional law . . . . [n]or does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.* at 302-303.

Finally, in *Rock v. Arkansas*, 483 U.S. at 47-49, the defendant was prevented, by a state evidentiary rule barring the admission of hypnotically refreshed testimony, from testifying about anything she remembered about the crime after being hypnotized. Before hypnosis, the defendant, who was charged with manslaughter in the shooting death of her husband, could not remember the details of the shooting; after hypnosis, she was able to remember that she had not had her finger on the trigger of the gun and that the gun had fired accidentally when her husband grabbed her arm. *Id.* at 46-47. A gun expert examined the gun and determined that it was defective and prone to fire when hit or dropped, without the trigger being pulled. *Id.* at 47. The trial court nevertheless limited the defendant's testimony to what she had told the doctor who hypnotized her prior to the hypnosis. *Id.* at 47, 57.

This Court stated that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve" and that "[i]n applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 55-56. Application of the rule "had a significant adverse effect on petitioner's ability to testify" because it "virtually prevented her from describing any of the

events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses." *Id.* at 57. The defendant was not permitted to describe the actual shooting except in the words contained in the doctor's notes. *Id.* While other states had also adopted rules barring hypnotically refreshed testimony, their rules applied to the testimony of witnesses, not defendants. *Id.* This Court concluded that Arkansas had not "shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 61.

The Connecticut Supreme Court's Decision Does Not Conflict With This Court's Jurisprudence On The Right To Present A Defense

Polygraph evidence is qualitatively different from the types of evidence excluded in *Washington, Chambers* and *Rock.* Polygraph evidence is an opinion as to whether a person told the truth when asked certain relevant questions about the crime during an examination out of court. Polygraph evidence cannot provide the jury with any additional substantive facts or circumstances concerning the crime. When offered by a defendant who testifies at trial, its sole purpose is to bolster his or her credibility with an opinion that when the defendant denied committing the crime during a polygraph examination, he or she was telling the truth.

For example, in the present case, the petitioner sought to

admit evidence that he denied committing the crime during a polygraph examination, and that in the polygraphist's opinion no deception was indicated. Although this evidence was excluded, the petitioner was permitted to testify and assert an alibi defense, and was permitted to present other witnesses to support this defense. Unlike the defendants in *Washington*, *Chambers* and *Rock*, the petitioner was provided with a full opportunity to present his version of the facts to the jury. All he was prevented from doing was bolstering the credibility of his testimony with self-serving hearsay statements made during a polygraph examination, and with the polygraphist's opinion that no deception was indicated. Because polygraph evidence is collateral to the substantive factual issues of a case, its exclusion does not prevent a defendant from presenting his version of the facts to the jury.

For similar reasons, the petitioner's polygraph evidence was not "critical" to his defense in the sense that the excluded evidence in *Washington*, *Chambers* and *Rock* was critical. In those cases, the evidence was critical because the information it provided could not be obtained by the jury from another source. In contrast, juries long have been entrusted with determining whether a witness is telling the truth by observing the witness' testimony and evaluating it together with all the other facts and circumstances of the case. Because jurors are able to evaluate credibility without polygraph evidence, such evidence is not "critical."

In addition, the Connecticut Supreme Court's decision to

exclude polygraph evidence from state trials does not disadvantage the defense more than the prosecution without a rational basis, nor arbitrarily exclude defense evidence that bears strong assurances of reliability. The court held that polygraph evidence is per se inadmissible in state judicial proceedings that are subject to the rules of evidence. *State v. Porter*, 241 Conn. at 94, 115, 135 n.80. That holding prevents the prosecution and the defense alike from introducing such evidence. Thus, it is completely unlike the rule in *Washington v. Texas* that allowed the prosecution to offer the testimony of a coparticipant in the crime charged while preventing the defense from doing so, even though such testimony was less likely to be reliable if offered by the prosecution than if offered by the defense.

The Connecticut Supreme Court's decision to bar polygraph evidence also is not arbitrary, but rather is well-reasoned and based on strong policy considerations. The court's decision is not based on antiquated common-law presumptions or precepts, but rather upon a thorough review of the contemporary literature on the subject, a careful weighing of the probative value versus the potential prejudice of such evidence, and an examination of the policies and experiences of other states. A majority of the states still bar polygraph evidence, and four states that have experimented with admitting such evidence have deemed such experiments a failure. The accuracy of polygraph evidence is still widely debated and cannot be ascertained with any degree of certainty. In contrast to *Rock v. Arkansas*, Connecticut is not the only state that bars defendants from presenting polygraph

evidence. Unlike the evidentiary rules in *Chambers v. Mississippi*, Connecticut's rule is not antiquated and is not premised on a principle that lacks contemporary validity.

The Connecticut Supreme Court's decision represents a rational policy choice based upon a careful weighing of the probative value and prejudicial impact of polygraph evidence. Polygraph evidence does not contribute any facts relevant to the crime charged. It is relevant only to the issue of credibility, which the jury is competent to evaluate without expert testimony. Thus, polygraph evidence has little probative value. The questionable accuracy of polygraph results reduces the probative value of this evidence even further. On the other hand, the potential for prejudice is great. In the present case, the petitioner sought to admit a polygraph examiner's opinion that he was not being deceptive when he denied robbing Morcey's Restaurant. If a jury were to credit the polygraph examiner's opinion, it would have to acquit the defendant, regardless of his demeanor on the stand and regardless of all of the other evidence presented at trial. The Connecticut Supreme Court noted that "[v]ery few studies have been done on the influence that polygraph evidence has over juries, and the cumulative results of those studies are inconclusive." *State v. Porter*, 241 Conn. at 117. The court stated that "this uncertainty alone justifies the continued exclusion of polygraph evidence." *Id.* at 118. Because polygraph evidence is potentially dispositive of the question of guilt or innocence, it poses a serious threat to the administration of justice.

The petitioner essentially takes the position that any per se exclusion of evidence is arbitrary and violative of the constitutional right to present a defense. This position is insupportable. Requiring evidentiary hearings every time a defendant seeks to introduce polygraph evidence would place a tremendous burden on the state trial courts. This is especially true because polygraph evidence is potentially relevant in every criminal trial with respect to every defense witness.

In *Chambers* and *Rock*, this Court did not hold that per se rules of inadmissibility are always arbitrary and violative of the right to present a defense. Instead, this Court held that while rules barring hearsay and hypnotically refreshed testimony are based upon reliability concerns, there were strong reasons for believing that the evidence sought to be admitted in those cases was actually reliable. In *Rock*, the facts remembered by the defendant after hypnosis were corroborated by the testimony of an expert witness who examined the gun. In *Chambers*, McDonald's hearsay confessions were corroborated by the testimony of eyewitnesses to the crime and were made under circumstances bearing strong assurances of reliability.

In contrast, in the present case, the record is devoid of corroborative evidence or other circumstances indicating that the petitioner's polygraph evidence was reliable. The petitioner testified and called an alibi witness; however, both had motives for exculpating the petitioner, and their testimony was heavily impeached and contradicted by other witnesses. Moreover, because the validity of the theory underlying polygraphy itself is

questionable, there is nothing in the circumstances of an individual polygraph that can provide strong assurances of reliability. Thus, a per se rule of exclusion is justified.

Finally, there is nothing in the circumstances of this case to suggest that the petitioner was deprived of a fundamentally fair trial. He was allowed to present his version of the facts to the jury and to have the jury evaluate nis credibility. He testified and called an alibi witness. There is nothing in the record to indicate that his polygraph evidence bore strong assurances of reliability. In sum, there is nothing to bring the petitioner's case within the ambit of this Court's decisions in *Washington v. Texas*, *Chambers v. Mississippi*, and *Rock v. Arkansas*. Thus, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of the State of Connecticut should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

SUSAN C. MARKS*
Supervisory Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney

LISA HERSKOWITZ
Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5807; FAX (860) 258-5828

*Counsel of Record